



GRETCHEN WHITMER  
GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF  
ENVIRONMENT, GREAT LAKES, AND ENERGY  
LANSING



LIESL EICHLER CLARK  
DIRECTOR

July 6, 2020

Mr. Andrew Wheeler, Administrator  
United States Environmental Protection Agency (EPA)  
William Jefferson Clinton Building  
1200 Pennsylvania Avenue, NW (1101A)  
Washington, DC 20460

Dear Administrator Wheeler:

SUBJECT: Docket ID No. EPA-HQ-OW-2020-0008-0001

These comments are being submitted in response to the May 21, 2020, Federal Register Notice regarding the Request for Comment on Whether EPA's Approval of a Clean Water Act (CWA) Section 404 Program Is Non-Discretionary for Purposes of Endangered Species Act (ESA) Section 7 Consultation. As one of only two states to administer Section 404 of the federal CWA, the State of Michigan appreciates the opportunity to provide input. Michigan has been administering the Section 404 Program for 35 years.

As a state that already administers Section 404 of the federal CWA, we do not support the EPA changing its position on whether its approval of CWA Section 404 programs is non-discretionary. This is for several reasons:

- As outlined in the EPA's 2010 letter to the Environmental Council of the States and the Association of State Wetland Managers, the EPA's current position is supported by federal regulations and case law. Furthermore, the process and criteria for assumption is well-defined in regulation, and the regulations make it clear that the EPA must approve state programs that meet the criteria. The regulations also clearly outline an opportunity for the United States Fish and Wildlife Service (USFWS) to comment during the EPA's review of state programs but they do not reference consultation.
- The EPA's current position allows the EPA, USFWS, and states flexibility on how to best address ESA concerns in state Section 404 programs while requiring states to be as stringent in its operation. In other words, the resulting protection is the same or better as what Section 7 consultation would provide while providing flexibility to the states. This is consistent with the other requirements for state Section 404 programs as outlined in federal regulations.
- Although Section 7 consultation is currently not required for program assumption or during state permit review, federal regulations do prohibit a state from issuing a permit that jeopardizes the continued existence of species listed as


endangered or threatened under the ESA and requires federal review of permit applications with a reasonable potential for affecting endangered or threatened species as determined by the USFWS (a comparably higher standard than provided by consultation).

- This change would alter oversight of existing state Section 404 programs for Michigan and New Jersey, and the potential negative impacts have not been addressed.

Michigan has been a leader in wetland, lake, and stream protection for almost 50 years. We appreciate the cooperative relationship that we have with the EPA and look forward to working together for clear, efficient, and effective environmental protection.

If you have additional questions, please contact Ms. Amy Lounds, Manager, Field Operations Support Section, Water Resources Division, at 517-331-7966 or [LoundsA@Michigan.gov](mailto:LoundsA@Michigan.gov); or you may contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Sanders', with a stylized flourish at the end.

Jerrod Sanders, Assistant Division Director  
Water Resources Division  
269-350-1801

cc: Ms. Teresa Seidel, Michigan Department of Environment, Great Lakes, and Energy (EGLE)  
Ms. Amy Lounds, EGLE  
Ms. Anne Garwood, EGLE